INDEX

	Page
Introduction	1
I. Contrary to Assertions in Plaintiffs' Brief, the Only Constitutional Violations Alleged and Found Extant in This Case Relate to the Operation of the City of Detroit School District	2
II. Section 12 of Act 48, P A 1970, Had No Material Effect On the Racial Composition of Detroit Schools and No Effect Whatsoever On the Racial Composition of Detroit Vis-a-vis Other School Districts	11
III. The Division of Statutory Responsibilities in Michigan Places the Day-to-Day Authority Over the Management and Control of Public Schools Squarely On the Local School Districts	15
IV. There Is No Constitutional Violation to Support the Multi-School District Racial Balancing Remedy Decreed by the Courts Below	17
V. The Concept of Majority White Schools Inherent in the Multi-School District Remedy	21
VI. Respondents Have Incorrectly Analyzed the Applicability of Rule 19, the Due Process Clause and the Scope of the Remand Ordered by the Court of Appeals	22
Conclusion	29

TABLE OF AUTHORITIES

Cases: Page

Alexander v. *Holmes County Board of Education*, 396 U.S. 19 (1969) 30

Airport Community Schools v. *State Board of Education*, 17 Mich. App. 574; 170 N.W. 2d 193 (1969) 16

Akron Board of Education v. *State Board of Education of Ohio*, ____ F. 2d ____ (CA 6, 1974); 42 L.W. 2395, 1-15-74 27,28

Attorney General v. *Lowrey*, 131 Mich. 639; 92 N.W. 289 (1902) 25

Bradley v. *Milliken*, 433 F.2d 897 (CA 6, 1970) .. 11, 12, 13

Bradley v. *Milliken*, 438 F.2d 945 (CA 6, 1971) .. 12

Bradley v. *Milliken*, 484 F.2d 215 (CA 6, 1973) .. 8

Bradley v. *School Board of the City of Richmond, Virginia*, 51 F.R.D. 139 (E.D. Va. 1970) 23, 24

Bradley v. *School District of the City of Richmond*, 462 F.2d 1058 (CA 4, 1972), *aff'd.* by equally divided Court, 412 U.S. 92 (1973) 29

Brown v. *Board of Education of Topeka*, 347 U.S. 483 (1954) 21,30

Davis v. *Board of School Commissioners*, 402 U.S. 33 (1971) 20

Detroit Museum of Art v. *Engel*, 187 Mich. 432; 153 N.W. 700 (1915) 25

Dred Scott v. *Sanford*, 60 U.S. (19 How) 393 (1856) 21

Gomillion v. *Lightfoot*, 364 U.S. 339 (1960) 30

Graver Tank & Mfg. Co. v. *Linde Air Products Co.*, 336 U.S. 271 (1949) 10

Griswold v. *Connecticut*, 381 U.S. 479 (1965) ... 28

Hall v. *Ira Township*, 348 Mich. 402; 83 N.W. 2d 443 (1957) 27

Cases: (Continued) Page

Higgins v. *Board of Education of the City of Grand Rapids*, ____ F. Supp. ____ (W.D. Mich. 1973, Case No. 6386) 14

Hoots v. *Commonwealth of Pennsylvania*, 359 F. Supp. 807 (W.D. Pa. 1973) 24

Husbands v. *Commonwealth of Pennsylvania*, 359 F. Supp. 925 (E.D. Pa. 1973) 24

Jones v. *Grand Ledge Public Schools*, 349 Mich. 1; 84 N.W. 2d 327 (1957) 6, 17

Keyes v. *School District No. 1, Denver, Colo.*, 413 U.S. 189 (1973) 5, 13

Moor v. *County of Almeda*, 411 U.S. 693 (1973) . 27

Neil v. *Biggers*, 409 U.S. 188 (1972) 10

Nelson v. *Garland*, 123 P. Super 257; 187 A. 316 (1936) 27

Penn School District No. 7 v. *Lewis Cass Intermediate School District Board of Education*, 14 Mich. App. 109; 165 N.W.2d 464 (1968) 16

The People ex rel Joseph Workman v. *The Board of Education of the City of Detroit*, 18 Mich. 399 (1869) 12, 15

Pierce v. *Society of Sisters*, 268 U.S. 510 (1925) . 26, 28

Plessy v. *Ferguson*, 163 U.S. 537 (1896) 30

Provident Bank v. *Patterson*, 390 U.S. 102 (1968) 24

Rogers v. *Commissioner, etc.*, 320 U.S. 410 (1943) 3

San Antonio Independent School District v. *Rodriguez*, 411 U.S. 1 (1973) 8, 10, 17, 27

School District of the City of Lansing v. *State Board of Education*, 367 Mich. 591, 116 N.W. 2d 866 (1962) 16

Sinking-Fund Cases, 99 U.S. 700 (1878) 26

South Carolina v. *Katzenbach*, 383 U.S. 301 (1966) 26, 27

Spencer v. *Kulger*, 326 F. Supp. 1235 (N.J. 1971), *aff'd* 404 U.S. 1027 (1972) 29

Cases: (Continued)

	Page
Swann v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971)	10, 11, 17, 19, 20, 29, 30
Township of Middletown v. *Institution District, Pa. Commonwealth*, 6 Pa. Comwlth., 146; 293 A. 2d 885 (1972)	27
Township of River Vale v. *Town of Orangetown*, 403 F. 2d 684 (CA 2, 1968)	27
United States v. *Choctaw County Board of Education*, 310 F. Supp. 804 (1969)	21
Wisconsin v. *Yoder*, 406 U.S. 205 (1972)	28
Wright v. *Rockefeller*, 376 U.S. 52 (1964)	20
Wright v. *Council of the City of Emporia*, 407 U.S. 451 (1972)	20, 29
United States Constitution	
Fifth Amendment	25, 26, 27, 28
Fourteenth Amendment	26, 27, 29
Federal Rules of Civil Procedure	
Fed. R. Civ. P. 19	24, 25
Michigan Constitution of 1908	
art 10, §12	25
art 11, §6	7
Michigan Constitution of 1963	
art 8, §2	12, 16, 19
art 9, §11	8, 16
Michigan Statutes	
Act No. 331, Public Acts of Michigan 1947 (amended Act No. 258, Public Acts of Michigan 1972; amended Act No. 101, Public Acts of Michigan 1973)	9

	Page
Act No. 269, Public Acts of Michigan 1955 (Michigan Compiled Laws 340.1 *et seq.*)	26
Michigan Compiled Laws 340.252	23
Michigan Compiled Laws 340.253	23
Michigan Compiled Laws 340.352	26
Michigan Compiled Laws 340.355	18
Michigan Compiled Laws 340.356	18
Michigan Compiled Laws 340.582	17
Act No. 287, Public Acts of Michigan 1964 (as amended Act No. 382, Public Acts of Michigan 1965; Michigan Compiled Laws 388.1010)	7
Act No. 239, Public Acts of Michigan 1967 (as amended Act No. 130, Public Acts of Michigan 1968; Michigan Compiled Laws 388.711 *et seq.*)	
Michigan Compiled Laws 388.711	15, 16
Michigan Compiled Laws 388.712	16
Michigan Compiled Laws 388.713	16
Michigan Compiled Laws 388.715	16
Michigan Compiled Laws 388.716	16
Act No. 244, Public Acts of Michigan 1969 (amended Act No. 48, Public Acts of Michigan 1970)	11
Act No. 48, Public Acts of Michigan 1970 (Michigan Compiled Laws 388.171 *et seq.*) ..	11, 12, 13, 15
Act No. 101, Public Acts of Michigan 1973 (Michigan Compiled Laws 388.1101 *et seq.*) .	9
Michigan Compiled Laws 388.1111	16
Michigan Compiled Laws 388.1177	9
Miscellaneous	
Official Record, Michigan Constitutional Convention, Volume II	16

SUPREME COURT OF THE UNITED STATES
October Term 1973

No. 73-434

WILLIAM G. MILLIKEN, Governor of the State of Michigan, et al.,

Petitioners,

-v-

RONALD BRADLEY, et al.,

Respondents.

No. 73-435

ALLEN PARK PUBLIC SCHOOLS, et al.,

Petitioners,

-v-

RONALD BRADLEY, et al.,

Respondents.

No. 73-436

THE GROSSE POINTE PUBLIC SCHOOL SYSTEM,

Petitioner,

-v-

RONALD BRADLEY, et al.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONERS, MILLIKEN, ET AL., ALLEN PARK PUBLIC SCHOOLS, ET AL. AND THE GROSSE POINTE PUBLIC SCHOOL SYSTEM

INTRODUCTION

This Joint Reply Brief is filed on behalf of Petitioners Milliken, et al., Allen Park Public Schools, et al., and The Grosse Pointe Public School System.

The filing of this Joint Reply Brief is occasioned by the unwarranted license taken by Plaintiffs-Respondents Bradley, et al., in regard to the record below in an attempt to manufacture some hopefully supportive basis for their argument to this Court.

The short period of intervening time between the receipt of Respondents' briefs and argument before this Court does not permit treatment of each and every gross misstatement and exaggeration of fact and law made by Respondents. Petitioners, however, urge the Court to give most searching scrutiny to Respondents' citations of fact and law in relation to the propositions which such citations assertedly support.

The keystone of Plaintiffs-Respondents Bradley, et al., argument is the completely unfounded assertion that the District Court found, and the Court of Appeals affirmed, that the State of Michigan and Respondent Detroit Board of Education intentionally confined black children to a nucleus of black schools by maintaining a reciprocal ring of white schools in the "suburbs" (Bradley Brief, page 38). Such unfounded assertion is laced throughout the Bradley Brief and is the counterfeit thread which holds Respondents' argument together.

As will be discussed more fully hereinafter, the actual facts are that this case was commenced, tried and decided on the grounds of a constitutional violation with respect to the *operation* of a single school district, i.e. Detroit.

Zealous pursuit of a cause is an understandable ingredient of effective advocacy, but does not justify an attempt to transmogrify a case on appeal.

I.

CONTRARY TO ASSERTIONS IN PLAINTIFFS' BRIEF, THE ONLY CONSTITUTIONAL VIOLATIONS ALLEGED AND FOUND EXTANT IN THIS CASE RELATE TO THE OPERATION OF THE CITY OF DETROIT SCHOOL DISTRICT

Plaintiffs, in their Statement of Questions and throughout their brief, aver that the question derived from the findings below

and presented to this Court, is predicated upon intentional confinement of black children to the Detroit school district by means of local school district boundaries. As Mr. Justice Frankfurter once observed, the right answer depends on putting the right question. *Rogers* v. *Commissioner, etc.*, 320 U.S. 410, 413 (1943). Plaintiffs in their complaint never alleged any purposeful intent to segregate black children in the Detroit school district vis-a-vis other school districts (Pet. A. 1a-16a).* There has been no hearing on any asserted question of alleged confinement of black children within the Detroit school district (Pet. A. 18a) and the findings of the District Court were, like the trial on the merits, expressly limited to a finding of "a de jure public segregated school system *in operation in the City of Detroit.*" (Pet. A. 38a, Emphasis added.) Plaintiffs have not put the right question. Whatever decision emanates from the Court, Petitioners feel it should be founded upon appraisal of the case in light of the actual facts.

Examination of Plaintiffs' complaint and prayer for relief (Pet. A. 1a-16a), their claims in the pre-trial statements (A. Ia75, Ia103-104), and their opening statement by counsel (R. 10-12), conclusively demonstrate that Plaintiffs' claims of unconstitutionality were limited to the internal operation of the Detroit school district. Plaintiffs thus alleged racial discrimination in pupil assignments within Detroit and the relief sought was limited to the establishment of a unitary system of schools therein. Plaintiffs' case did not relate, in any manner, to alleged pupil discrimination by race deriving from any school district's creation or boundary. Until it reached the question of remedy, the trial court proceeded on this basis, as set forth in the following quote:

> "Well, I don't know whether fortunately or unfortunately *this lawsuit is limited to the City of Detroit and the school system,* so that we're only concerned about the city

*Citations denoted "Pet. A. " refer to the single volume Appendix filed with the Petitions for Writs of Certiorari. Citations denoted "A. " refer to the volume and page of the five (5) volume single Appendix filed subsequent to the granting of the Petitions for Writs of Certiorari. Citations denoted "(a)" refer to the single volume Appendix to Brief of Petitioners Milliken, et al. Citations denoted "(R.)" refers to those portions of the transcript of testimony below not included in the appendices filed with the Court.

itself and *we're not talking about the metropolitan area.*" (A. IIa41, Emphasis added.)

In addition to the Detroit defendants, the Governor, the Attorney General, State Board of Education and Superintendent of Public Instruction of Michigan were named as defendants. Neither the State of Michigan nor the Michigan legislature was named as a party defendant. No school district other than Detroit was named as a defendant. Further, no claim was made that any alleged state system of public schools was established or operated in a *de jure* segregatory manner as between Detroit and any of the other eighty-five (85) school districts in the tri-county area (Pet. A. 1a-16a).

The case was tried on the basis of a Detroit-only violation and the only ruling by the trial court on the question of violation, as distinguished from remedy, was limited to *de jure* pupil segregation within Detroit (Pet. A. 33a). In its Ruling On Issue of Segregation, the trial court made no finding that black students were confined within Detroit and excluded from any other school district as a result of any actions by defendants Milliken, et al., or local school authorities (Pet A. 17a-39a). Subsequently, the trial court expressly stated that it took *no proofs* with respect to establishment of any school district boundaries or with respect to whether segregatory actions were committed by any local school district, other than Detroit, as follows:

> "... It should be noted that the court has taken no proofs with respect to the establishment of the boundaries of the 86 public school districts in the counties of Wayne, Oakland and Macomb, nor on the issue of whether, with the exclusion of the city of Detroit school district, such school districts have committed acts of de jure segregation." (Pet. A. 59a-60a).

In the Court of Appeals, the case was argued and decided on questions of violations in the operation of the Detroit school district and the appropriate scope of the remedy (Pet. A.111a, 117a-118a).

Plaintiffs' question 1 and their repeated statements in this Court concerning alleged confinement of blacks within Detroit

misstate the true nature of this cause. Plaintiffs seek to argue a new and entirely different cause of action in this Court. In support of this new cause of action, Bradley Brief, pages 20-21, n. 15, attempts to weave a theory that, although none of the other school districts involved are tainted with segregatory boundaries or conduct, nevertheless the actions of defendants Milliken, et al., purposefully resulted in separating pupils by race between Detroit and the other eighty-five (85) school districts in the tri-county area. Such contention is pure fiction as hereinafter shown.

It should be noted that neither lower court made any specific findings that defendants Governor, Attorney General or State Treasurer committed any purposeful acts of segregation with the present causal effect of separating school children by race as, indeed, there was no evidence on the record of any such acts. Thus, as to them, under the controlling authority of *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. 189 (1973), the case should be dismissed.

Plaintiffs' reliance on "faculty allocation" is belied by the trial court's express holding that "no teacher in the Detroit Public Schools is hired, promoted or assigned to any school by reason of his race" (Pet. A. 28a) and, again, the trial court's express statement that it took *no proofs* with respect to whether any school district, other than Detroit, committed any acts of *de jure* segregation (Pet. A. 60a).

Plaintiffs' contention that "school construction throughout the metropolitan area" was pursued with segregative intent (Bradley Brief, page 44) and furnishes a foundation for extending the remedy beyond Detroit is fabricated out of whole cloth and is completely unsupported by the record in this case.

There is not an iota, not a jot, not a tittle, of evidence in this case relating to the need, location or purpose of school construction in any school district other than Detroit.

Plaintiffs' apparent contention that the building of new schools in school districts outside of Detroit was undertaken to lure whites from Detroit in furtherance of a policy of racial segregation is ridiculous. The naked fact that schools were constructed within various local school districts carries no implication of intentional segregatory action.

School construction is a response to population growth, not the cause thereof. In this regard Plaintiffs' expert witness testified as follows:

> "Q. I notice the contradiction in the cross examination of various counsel, Dr. Foster. On the one hand Mr. Beer asked you if you were aware that school districts in the suburbs, in anticipation of growth in their area, had built substantial excess capacity which was just waiting for people to move into, and on the other hand Mr. Saxton's question was to the effect that did you know whether or not any of the districts were in double sessions and were expecting growth, influx of pupils in excess of what they were able to handle. And I've forgotten which particular districts it was he asked you about.
>
> "Do you know whether or not school districts customarily have a great deal of capacity built in advance, ready for use before the students are actually there [on] hand, or do school districts generally play catch up?
>
> "A. Except for building specifically for something like a housing project that's going up, and, then it wouldn't be dated very far ahead. Quite often thats a catch up proposition. Also, most school districts do not have the financial means to build well ahead of occupancy, I would say." (A. IVa260).

Local school districts would indeed be remiss if they ignored the need for additional school facilities to meet the educational needs of their respective communities. Moreover, the fact that construction of local school district facilities was paid for from taxes levied against only the property owners in the school district provides further rational basis for constructing school facilities to meet the needs of the local school district community.

None of defendants Milliken, et al., had or has any authority to require a local school district to build school facilities to serve persons outside that school district or to require a local school district to admit non-resident pupils in attendance. *Jones* v. *Grand Ledge Public Schools*, 349 Mich. 1; 84 N.W. 2d 327 (1957). Plaintiffs' rhetorical argument relative to the purpose and effect of school construction outside Detroit is simply without substance.

Plaintiffs' reliance on "merger of districts" and "pupil assignment across school district boundaries for the purpose of segregation" is devoid of merit. The single alleged instance of crossing school district boundary lines for alleged segregatory purposes relates to the Carver School District. Plaintiffs rely on a statutory provision enacted in 1964, long after transportation of Carver pupils ceased, to show State Board of Education involvement in transportation *by Detroit* occurring during the 1950's. See Bradley Brief, pages 19-20, n. 14, and § 10(c) of 1964 PA 287, M.C.L. 388.1010(c) and (Pet. A. 169a). During the period in question the State Board of Education's primary duties related to "general supervision of the state normal college and the state normal schools" under Mich Const 1908, art 11, §6. Plaintiffs have not offered a scintilla of record evidence in support of alleged State Board of Education knowledge, let alone approval, of such transportation.

Further, Plaintiffs' allegation (Bradley Brief, pages 19-20, n. 14) that a portion of the Carver School District was merged into Ferndale School District is absolutely untrue. Both the record and the ruling below conclusively demonstrate that *all* of the Carver School District was merged with the contiguous Oak Park School district in 1960. (See A. IIa109-110, Va181, Va186; Pet. A. 138a, 169a). Further, the HEW proceeding against Ferndale involved a claim that, out of twelve (12) schools, including one junior high and one high school, only the Grant elementary school, constructed in 1926, was *de jure* segregated. The hearing examiner explicitly stated "[t]hat part of the Township on Eight Mile Road west of Wyoming is the 'Grant neighborhood.' (Royal Oak Township east of Wyoming Avenue is in the Carver district, not the Ferndale School District)" HEW Docket No. CR-866, Initial Decision, 9/28/70, p. 4. In that proceeding the Michigan Department of Education was also named as a respondent but no claims or proofs of purposeful segregatory action were made against such respondent.

The attempt to show an alleged continuing violation as to Carver is futile. What the record does reflect is that, contrary to Plaintiffs' confinement argument, the predominantly black population in Carver was attached by local school authorities to pre-

dominantly white Oak Park in 1960, not confined to Detroit (Pet. A. 169a, A. Va113). This is the only "merger of districts" alluded to in this cause and it demonstrates that Plaintiffs' claims are empty.

The lower courts relied on alleged inter-district financial disparities in ruling against defendants Milliken, et al. (Pet. A. 27a, 152a). However, only the Michigan legislature, not a party to this action, makes appropriations for public education. Mich Const 1963, art 9, § 11. It has been demonstrated that Detroit has one of the lowest school operating tax rates in the tri-county area (Brief of Milliken, et al., page 28) and yet, as admitted by the Detroit school board to this Court, it "... does make higher general fund expenditure per pupil than most of the other school districts." (Detroit Brief, page 75). The reliance by the lower courts on alleged inter-district financial disparities is exceptional error. *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973).

Plaintiffs' reliance on alleged "disparity of bonding authority" is surprising in light of the Sixth Circuit's self-correction of error in this regard. Compare pages 41, 47-49 of the opinion of December 8, 1972, and 484 F. 2d 215, 238-241 (1973), (Pet. A. 151a-157a) of the opinion issued June 12, 1973. It is uncontroverted that Detroit's three percent (3%) bonding authority, without a vote of the people, had never been exhausted by Detroit when it was increased to five percent (5%) of the state-equalized valuation of taxable property within the district, thus bringing it in percentage harmony with all other classes of school districts (R. 3547-3549; 17aa-18aa, 25aa-26aa, 31aa, 33aa-34aa). Having the greatest aggregate tax base of any school district in the State, at three percent (3%) Detroit could issue bonds for school construction in an amount exceeding 150 million dollars, thus putting it far ahead of any other school district in terms of actual dollar volume for bonding without a vote of the people. The increase from three percent (3%) to five percent (5%) for Detroit added another 114 million dollars in non-voted bonding authority (R. 3550). This claim of alleged discrimination is, indeed, hollow.

Plaintiffs' reliance on "disparity of ... transportation funding" relates to the statutory geographical classification for purposes of state aid categorical transportation reimbursement to

school districts that limits reimbursement to students living outside city or village limits. This statutory classification is of long standing and totally unrelated to racial motivation. For example, in §34 (b) of 1947 PA 331, the legislature provided that "[a]dditional allotments for transportation of pupils shall be made . . . to school districts transporting pupils within the district but living outside the village or city corporate limits. . ." In 1950, the black population of the City of Detroit was only 16.2% of the total population (Pet. A. 21a). Further, in §77 of 1973 PA 101, M.C.L. 388.1177, the legislature has made an initial categorical appropriation of $1,500,000.00 for transportation within cities and villages.

Plaintiffs' reference to " 'walk-in' desegregation" (Bradley Brief, page 36, n. 34) is put to rest by the District Court's ruling that ". . . 310,000 of the 780,000 children within the desegregation area will require transportation in order to accomplish maximum actual desegregation" (Pet. A. 72a) within a ". . . rough, TALUS 40-minute travel time line" one way (Pet. A. 69a). This conjectural one way travel time projection is based upon average driving time from a central point in downtown Detroit to certain perimeter lines along a minimum time path (R. Metro Plans, 1105-1109). However, students do not live at a central point within the school district and must either walk to a central point or be picked up by the bus prior to arriving at a central point for departure to a school within another school district. Moreover, students would be transported during peak traffic periods. Thus, from the student's point of view, the conjectural forty (40) minute travel time one way does not accurately reflect the substantially longer period of his time that would actually be consumed daily by virtue of a multi-district remedy (Deposition of Harold Wagner, pages 81-83).

Any contention that any substantial number of school children are presently transported to school districts other than those in which they reside is without support. Less than 1/2 of 1% of all the school children in the tri-county area reside in one school district and receive their education in another school district in the tri-county area. Such education is provided in the areas of special education for handicapped children and vocational education.

Plaintiffs Bradley et al., ask this Court to invoke the "two court rule" as judicial blinders to preclude examination and review of essential facts. Petitioners submit that this case comes squarely within the two well-recognized exceptions to the rule. First, one

of the grounds stated by Petitioners Milliken, et al. in its Petition for Certiorari was the obvious and exceptional error of the "factual" determinations of the lower courts. *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). Second, the two-court rule is inapplicable "where the dispute between the parties is not so much over the elemental facts as over the constitutional significance to be attached to them". *Neil* v. *Biggers*, 409 U.S. 188, 193, note 3 (1972).

The errors in the rulings of the courts below are set forth in the first division of the brief of Petitioners Milliken, et al., initial brief, pages 24-46. Only one of the rulings actually even comes close to pure factual determination, the ruling that the Carver children were transported from the Carver school district to Northern High School in the Detroit school district in the 1950's "with the approval, tacit or express, of the State Board of Education" (Pet. A. 152a). This ruling is challenged because on the record of this cause there is no evidence whatsoever of any approval or even knowledge by the defendant State Board of Education. Indeed, Plaintiffs Bradley, et al. rely on a 1964 statute, enacted after such transportation long ceased, rather than on any record evidence (Bradley Brief, p. 19, n. 14). The other rulings challenged involve conclusions of the constitutional effect of the laws of Michigan enacted by the legislature, and, thus, there is put squarely in issue before this Court the question whether the correct constitutional standards were applied by the courts below. For example, in the areas of alleged disparities in inter-district finance, neither lower court made any reference whatsoever to this Court's holding in *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973). (Pet. A. 27a, 151a-157a.)

Error should not be sanctified by repetition.

Plaintiffs' attempt, through the employment of strained semantics and polished rhetoric, to lead this Court to believe that a trial has been had and findings made as to the confinement of black children in Detroit vis-a-vis other school districts bares the fundamental flaw in their argument. This case was commenced, tried and decided on the basis of the asserted *de jure* segregated *operation* of the Detroit school district only, and there is no basis for any remedy extending beyond the nature of the violation. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971).

II.

SECTION 12 OF ACT 48, PA 1970, HAD NO MATERIAL EFFECT ON THE RACIAL COMPOSITION OF DETROIT SCHOOLS AND NO EFFECT WHATSOEVER ON THE RACIAL COMPOSITION OF DETROIT VIS-A-VIS OTHER SCHOOL DISTRICTS

"As with any equity case, the nature of the violation determines the scope of the remedy." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971). When a case is pleaded and tried on the theory that the Detroit school district is *de jure* segregated with respect only to the operation of its schools, the District Court's limited finding that the Detroit school district has been operated as a *de jure* segregated school district does not constitutionally permit a remedy extending beyond the Detroit school district (Pet. A. 17a, 38a).

It is within this overall framework that this Court should examine Plaintiffs' effort to advance a theory of multi-district remedy based primarily upon a philosopher's stone of the unconstitutionality of 1970 PA 48, § 12 (54aa-58aa), that is, a transmutation of something that involved only the Detroit school district into something that involves not only the Detroit school district but all of the other school districts in Michigan (Bradley Brief, pages 52-53, n. 45). As previously noted in the earlier brief of defendants Milliken, et al. (page 40), 1970 PA 48 consisted of fourteen (14) sections and was an amendment to a prior act, 1969 PA 244, designed to decentralize school districts of the first class (Detroit school district) to provide even greater voice in local school district affairs by persons residing therein. [1]

Although 1970 PA 48 has been before the courts since the beginning of this lawsuit, the only section thereof found to be unconstitutional was § 12, for the stated reason that it "thwarted, or at least delayed" [2] (not, "obstruct such action forever", as

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[1] Plaintiffs make the unsupported assertion that 1970 PA 48 "revalidated" the external boundaries of the Detroit school district (Bradley Brief, page 12). The simple answer to this assertion is that the Act did not deal with the external boundaries of the Detroit school district.

[2] 433 F. 2d 897, 904 (CA 6, 1970).

claimed by Plaintiffs, Bradley Brief, page 12) the effectuation of the Detroit Board of Education's April 7 racial balance plan to be effected in September, 1970, involving at most 3,000 to 4,000 tenth grade students in 12 of 21 high schools, or less than 1.5% of the total number of students in the Detroit school district. The April 7 racial balance plan was endorsed by defendant State Board of Education.[3]

Plaintiffs say that 1970 PA 48, §12, is evidence of a policy of segregation not only in the Detroit school district but statewide. This is pure fantasy. The policies of the State are set forth in its statutes and Constitution, and since at least 1867 the statutes or the Constitution of Michigan, or both, have prohibited the segregation of the races in the public schools. *The People ex rel Workman* v. *Board of Education of Detroit*, 18 Mich. 399 (1869); Mich Const 1963, art 8, §2.

The insignificance of the effect of Section 12 within the Detroit school district (to say nothing of its total lack of significance outside of the Detroit school district) is probably best illustrated by the fact that neither the District Court nor the Court of Appeals ordered into effect the April 7 plan, despite Plaintiffs' repeated requests, after Section 12 was declared unconstitutional. In fact, the Detroit Board of Education discarded the April 7 plan and recommended instead the MacDonald Magnet Plan, affecting 8,174 children in both junior and senior high schools,[4] which plan was ordered into effect by the District Court and affirmed on appeal.[5]

The assertion by Plaintiffs that 1970 PA 48, §12, so contaminated not only the Detroit school district but all other districts in Michigan, particularly those in Wayne, Oakland and Macomb counties, so as to require a multi-district remedy for *de jure* segregation with respect to pupil assignments within Detroit, is not only frivolous but also unsound as a matter of logic. The effect of 1970 PA 48, §12, affecting less than 1.5% of the enroll-

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[3] 433 F. 2d 897, 900 (CA 6, 1970).

[4] A. Ia90-Ia94; Report of the Detroit Board of Education On the Magnet Plan, page 1.

[5] 438 F. 2d 945 (CA 6, 1971).

ed pupils in the Detroit school district for a period of not more than ninety-eight (98) days [July 7, 1970, the effective date of the Act to October 13, 1970, the date of the Court of Appeals decision, 433 F. 2d 897 (CA 6, 1970)], is *de minimis*.

Nowhere is Plaintiffs' philosopher's stone approach more evident than in their assertion (Bradley Brief, pages 52-53, n. 45) that the unconstitutionality of 1970 PA 48, §12, shifts the burden of proof to defendants Milliken, et al. to establish "that racial separation of children in the Detroit area is in *no* part attributable to other state-level discriminations against the DSD, *and* that state financial support and tacit approval of local *de jure* practices were not intended".

As authority for this astounding assertion Plaintiffs cite "*Cf. Keyes* v. *School Dist. No. 1*," 413 U.S. 189 (1973). First, 1970 PA 48 was enacted by the legislature, not a party to this suit. Second, as indicated above, the effect of 1970 PA 48, §12, within the Detroit school district was *de minimis*. Third, *Keyes* involved the conduct of a single board of education defendant and the burden of proof was shifted only as to the *same defendant* who had committed purposeful acts of segregation within a portion of a single school district. Fourth, the logical conclusion of Plaintiffs' assertion is that the unconstitutionality of one section of one statute of limited application raises a presumption of unconstitutionality of all statutes enacted by the same state legislature and shifts the burden of proof upon parties, who did not enact such statute, as to their conduct in office unrelated to the statute.

In their attempt to bootstrap the unconstitutionality of 1970 PA 48, §12, into a multi-district remedy in this case, which was pleaded and tried on their own theory of single district violation and single district remedy, Plaintiffs, in obvious desperation, depart entirely from the facts of this case and, aided by their own gratuitous term "pervasive", seek to interject cases involving the local school districts of Pontiac, Benton Harbor, Grand Rapids,

Kalamazoo and Lansing (Bradley Brief, pp. 21-22, n. 17).[6] In Grand Rapids,[7] the Governor, Attorney General, State Board of Education and Superintendent of Public Instruction were joined as parties defendant along with the Grand Rapids Board of Education and eleven (11) adjacent school districts. Plaintiffs there claimed inter-district violations and sought multi-district relief. The same unfounded self-serving speculations here advanced by Plaintiffs were tested and rejected. After a full trial on the merits all of the eleven (11) adjacent districts and the Governor, Attorney General, State Board of Education and Superintendent of Public Instruction were dismissed from the case. Further, the Grand Rapids Board of Education was found not to have discriminated in the assignment of children to its schools. *Higgins v. Board of Education of the City of Grand Rapids,* ___ F. Supp. ___, W.D. Mich. 1973, Case No. 6386). The only constitutional violation found was in the assignment of teachers within Grand Rapids and this was promptly remedied solely by the Grand Rapids Board of Education, since teacher assignment is a matter of local control. Only the plaintiffs have appealed from that decision.

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[6] None of the defendants Milliken, et al., or the State of Michigan, were parties to the Pontiac, Benton Harbor or Lansing cases. In Pontiac the District Court finding of constitutional violations by the Pontiac Board of Education in the assignment of pupils and teachers was affirmed on appeal and certiorari was denied. In Benton Harbor no constitutional violation in the assignment of pupils was found, and the principal relief granted involved the assignment of teachers. Appeals by both sides are pending. Lansing involves the rescission of a racial balance plan for elementary pupils (there are no majority black junior or senior high schools) adopted by the Lansing Board of Education and later rescinded when its membership changed. By a preliminary injunction, the District Court ordered the effectuation of the racial balance plan. There has been no trial on the merits. In Kalamazoo, the Kalamazoo Board of Education adopted a racial balance plan for its elementary and junior high schools (there are no majority black junior or senior high schools) and "postponed" the racial balance plan when board membership changed. The relief granted, first by a preliminary injunction and then by a permanent injunction, was the effectuation by the Kalamazoo Board of Education of the racial balance plan. Only the State Board of Education and the Superintendent of Public Instruction were named parties defendant in Kalamazoo. Since, as in Lansing, both the adoption of the plan and the rescission of the plan was the sole act of the local board of education which controls pupil and teacher assignments, only nominal relief was granted against the State Board of Education and the Superintendent of Public Instruction in Kalamazoo. Appeals are pending.

[7] Plaintiffs' chief trial counsel herein and in the Grand Rapids case is the same.

It is significant that, with the sole exception of 1970 PA 4 §12, in the few "school desegregation cases" brought in Michig no state statute or administrative rule has been declared uncons tutional. The reason is obvious: since at least 1869 under Michig law racial segregation in the public schools has been, and is, proh bited. *The People ex rel Workman* v. *Board of Education o Detroit*, 18 Mich. 399 (1869).

III.

THE DIVISION OF STATUTORY RESPONSIBILITIES IN MICHIGAN PLACES THE DAY-TO-DAY AUTHORITY OVER THE MANAGEMENT AND CONTROL OF PUBLIC SCHOOLS SQUARELY ON THE LOCAL SCHOOL DISTRICTS

Since the brief of Respondents Detroit Board, et al. ess tially tracks the argument of Plaintiffs Bradley, et al., Petitione find no need for protracted reply thereto. However, certain err neous conclusions made by Respondents Detroit Board, et a should be noted.

Admittedly, ultimate control over public education in t State of Michigan is reposed in the State legislature, which is not party to this cause. However, the statutory division of responsibi ties places the day-to-day authority over management and contr of the public schools in local school boards. An examination the enumerated powers confided to local school districts (listed pages 42-44 and 47-48 of the Respondents Detroit Board Bri negates the contention that genuine local control does not exist the local school districts.

In seeking to divert attention from the extensive power a authority of local school boards, Respondents Detroit Board, et have, in some instances, erroneously characterized statutory la and purposefully avoided providing the Court with any in-dep explication of the power and authority of local school boards.

As an example, Respondents Detroit Board, et al. cite M.C §388.711 for their proposition that said Act "gives the Michig State Board of Education ultimate control over alteration of loc school district boundaries" (Detroit Board Brief, page 47, n. 3 Such broad contention is patently erroneous. To begin with, a

statute is expressly limited in application to "emergency" reorganization of primary and fourth class school districts in Wayne County. See M.C.L. §388.711, (65aa); and *Airport Community Schools* v. *State Board of Education*, 17 Mich. App. 574; 170 N.W.2d 193 (1969). Further, emergency reorganization must be initiated by either the local school board or electors of the local school district. M.C.L. §388.712 (65aa). Also, the holding of a public hearing and a finding by a state committee that conditions exist warranting immediate reorganization are a precondition to any action by the State Board of Education. M.C.L. §§388.713, 388.715, 388.716 (65aa-66aa). Respondents Detroit Board, et al.'s intended inference that the State Board of Education is vested with the power and authority to decree the reorganization of local school districts is simply unfounded.

Notwithstanding the erroneous construction of Michigan statutory law by Respondents Detroit Board, of which the above instance is but one example, the Michigan legislature has in no instance delegated "ultimate control over alteration of local school district boundaries" to any of the defendants herein.

Under Michigan law, plenary authority over the establishment and alteration of local school district boundaries rests in the State legislature. Mich Const 1963, art 8, §2 (3aa); *School District of the City of Lansing* v. *State Board of Education*, 367 Mich. 591, 595-596; 116 N.W.2d 866, 868-869 (1962); *Penn School District No. 7* v. *Lewis Cass Intermediate School District Board of Education*, 14 Mich. App. 109, 120; 165 N.W.2d 464, 470 (1968). No party to this case has ever disputed this state of the law.

With respect to the area of school finance, neither the State Board of Education nor any State officials have authority to withhold state aid funds from local school districts except for failure to comply with legislative mandates. The power of appropriation of state school aid funds to school districts is reposed solely in the Michigan legislature with "...[p]ayments from the fund ... to be made in full on a basis scheduled by legislative enactment..." Mich Const 1963, art 9, §11 (5aa), accompanying Address to the People, Constitutional Convention, *Official Record*, 1961, Vol. II, P 3400. Further, by statute state school aid funds "shall be allocated" to school districts "as provided in this act." M.C.L. §388.1111.

Respondents would have this Court labor under the false impression that the defendants Milliken, et al. possess the power to require the cross-school district reassignment of school children necessary to implement the remedy decreed by the District Court. The decision to admit non-resident students, however, is exclusively a matter of local school board control. *Jones* v. *Grand Ledge Public Schools*, 349 Mich. 1; 84 N.W. 2d 327 (1957); M.C.L. § 340.582 (49aa).

No party to this case has cited any Michigan law under which the defendants State Board of Education, its members and superintendent, the Governor, the Attorney General or the State Treasurer, is empowered to unilaterally alter school district boundaries, establish attendance zones, determine school site locations or disburse or withhold legislatively appropriated school funds. No such authority exists.

Any contention that pervasive and genuine local control over the day-to-day operation of school districts in the State of Michigan does not exist simply cannot be supported. *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 51-52, n. 108 (1973).

IV.

THERE IS NO CONSTITUTIONAL VIOLATION TO SUPPORT THE MULTI-SCHOOL DISTRICT RACIAL BALANCING REMEDY DECREED BY THE COURTS BELOW

Plaintiffs and Respondents Detroit Board, et al.'s argument in support of a multi-school district remedy pretermits the express limitation on judicial power as expressed by the unanimous opinion of this Court in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971) –

> "... the nature of the violation determines the scope of the remedy."

The record in this case shows that the Plaintiffs' cause of action was predicated solely on alleged constitutional violations with respect to the *operation*[8] of the City of Detroit school

[8] Plaintiffs have never contended that the boundaries of the Detroit school district, or any other school district, were established with segregatory intent and no evidence was offered to such effect (Pet. A. 59a-60a).

district (Pet. A. 1a-16a); the trial on the merits was limited to the issue of the alleged segregatory operation of the Detroit school district (A. IIa41); and the findings resulting from the trial on the merits were limited to "the issue of segregation in the public schools of the City of Detroit" (Pet. A. 38a).

Plaintiffs' argument is premised on the fallacious assertion that the trial on the merits resulted in a finding that defendants Milliken, et al., and Detroit Board, et al.'s actions were calculated to "confine" black children to a nucleus of schools in the Detroit school district while maintaining schools "for white children" in school districts beyond Detroit (Bradley Brief, page 53). This argument, verbalized in various fashion, is repeated again and again throughout Plaintiffs' brief in the apparent belief that constant repetition will convince the reader of the credibility of such assertion.

Argument is not evidence. The Court should note that Plaintiffs' "confinement" theory is not accompanied by any evidentiary citations to the record in this case. That such argument is without support is further attested to by the plain fact that the District Court took *no proofs* with respect to the establishment of the boundaries of any school district or, with the exclusion of Detroit, whether any school district has committed any acts of *de jure* segregation (Pet. A. 59a-60a).

Under Michigan law the only requirement for admission to a school within any given local school district is residence within the school district. This requirement applies equally to blacks and whites (M.C.L. 340.355, 340.356). There is no evidence in this case that any black children were denied admission to any school, or assigned to any school, because of race or color, outside the Detroit school district.

There is no evidence and no finding in this case that any of defendants Milliken, et al. or the defendant Detroit Board acted to preclude any black person from taking up residence outside the Detroit school district.

There is no evidence and no finding in this case that the boundaries of any school districts were established pursuant to any intent to foster racial segregation. No such claim is made even in Plaintiffs' amended complaint recently filed herein (A. Ia291-299).

In short, there is absolutely no connection between the constitutional violations here found and the racial composition of the Detroit school district vis-a-vis other school districts.

Plaintiffs' apparent contention that the State of Michigan or defendants Milliken, et al. had a constitutional duty to prevent school construction in school districts beyond Detroit as a means of discouraging white population growth is simply unsupportable.

Plaintiffs' contention that defendants Milliken, et al. had a constitutional duty to require local school districts beyond Detroit to locate new school facilities so as to counteract racial imbalance in Detroit is untenable. Said defendants possess no such power. The Michigan Constitution provides that:

> "... Every school district shall provide for the education *of its pupils* without discrimination as to religion, creed, race, color or national origin." Mich Const 1963, art 8, §2. [Emphasis added.]

To say that the construction of a new school in a school district located ten to twenty-five (10-25) miles distant from Detroit is a segregatory act because it will not alleviate racial imbalance in Detroit strains the bounds of common sense much less the Constitution.

The fallacy underlying the Respondents Detroit Board, et al. argument in support of the multi-district remedy is glaringly apparent in their contention that a required element of a desegregation plan is that –

> "... Every school, or almost every school, should contain a mixture of the races that roughly approximates the make-up of the student community as a whole. *Swann* v.

Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971); *Davis* v. *Board of School Commissioners*, 402 U.S. 33 (1971)." Detroit Board Brief, pp. 103-104.

There is no statement in *Davis* to such effect and in *Swann* this Court unanimously rejected any such contention. *Swann, supra*, at pages 22-23. Moreover, the "student community" with respect to the Detroit school district is the City of Detroit. No one in this case disputes that a desegregation plan which would mirror the Detroit pupil racial composition can be effected in the Detroit schools.

Plaintiffs' contention that the rationale requiring over-represented electoral districts to participate in a reapportionment remedy furnishes a constitutional peg on which to hang the multi-school district remedy in this case is a non-sequitur.[9] The fundamental difference between school districts and electoral districts is obvious. The constitutional standard against which the validity of electoral districts is to be measured is "practicable" equal population. Consequently, if one electoral district is over populated, one or more other electoral districts must be under populated. The constitutional violation is thus interdistrict in nature, as must be the remedy. Here the constitutional violations found are limited to the operation of the Detroit school district, as must be the remedy.

Stripped of rhetorical facade, Respondents' arguments come down to the simple proposition that racial imbalance between the Detroit school district and other school districts gives rise to a constitutional violation and commands a judicially-ordered dispersement of school children throughout such geographical area as can be traversed by motor vehicle in forty (40) minutes to the end that the schools, if not the local communities, will be racially balanced.

Neither a reasoned interpretation of the Constitution nor the decisions of this Court permit of any such judicial disruption of the State's educational system or the impairment of the rights and interests of parents and children affected thereby because of disparity of racial balance in separate school districts. *Wright* v. *Council of City of Emporia*, 407 U.S. 451, 470 (1972).

[9] In *Wright* v. *Rockefeller*, 376 U.S. 52 (1964), this Court rejected the contention that racial imbalance as between electoral districts violates the Constitution.

V.

THE CONCEPT OF MAJORITY WHITE SCHOOLS INHERENT IN THE MULTI-SCHOOL DISTRICT REMEDY

Brown I, 347 U.S. 483 (1954) speaks of the feeling-of-inferiority effect on children resulting from governmental action which dictates assignment to public schools on the basis of race or color. The "end" to be attained under the racial balancing "metropolitan" remedy decreed by the District Court was the reassignment of school children so as to restrict black children to a numerical minority in *every "school, grade" and "classroom"* (Pet. A. 101a-102a). [Emphasis added.] Why should black children be so confined? Certainly, nothing in the Constitution or the decisions of this Court so commands. How does the forced reassignment of black children to schools in limited numbers result in any less implication of inferiority than forced assignment in large numbers? Petitioners assert that reassigning black children among diverse school districts for the purpose of reducing them to a numerical minority implies that a predominance of black children constitutes invidious discrimination against black children and calls up haunting memories of *Dred Scott* v. *Sanford*, 60 U.S. (19 How.) 393 (1856).

Respondents make no attempt to refute such implication but seek to avoid the same by the false and irresponsible assertion that Petitioners have attributed "racist" motives to some members of the lower courts (Bradley Brief, pages 30-31, footnote 27). [10] Petitioners' statements do not reasonably permit of any such construction. The question raised by Petitioners, and unanswered by Respondents, relates to implicit effect, not motivation. Righteous motivation on the part of lower court judges is presumed by Petitioners. However, as noted in *U.S.* v. *Choctaw County Board of Education*, 310 F. Supp. 804, 810 (1969):

> ". . . Some of history's most glorious mistakes and most tyrannous acts were done in the name of (misconceived) righteousness."

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[10] Plaintiffs are like a chameleon. In opposing a motion to join Petitioners and other school districts during the trial on the merits, counsel for Plaintiffs Bradley, et al. stated on the record, "We want to be careful, your Honor, in our position as plaintiffs to make clear our disassociation from any concept that a school must be majority white. *We think* that is a racist concept". (Transcript of testimony before the U.S. District Court, July 26, 1971, R. 4688). [Emphasis added.]

VI.

RESPONDENTS HAVE INCORRECTLY ANALYZED THE APPLICABILITY OF RULE 19, THE DUE PROCESS CLAUSE AND THE SCOPE OF THE REMAND ORDERED BY THE COURT OF APPEALS

Plaintiffs have asserted that Petitioners School Districts have been ordered to do nothing and therefore any infringement of their rights is merely "potential", and will be corrected upon remand. Plaintiffs have ignored, however, the fact that the Court of Appeals has affirmed the District Court's holding that a metropolitan desegregation plan is "essential"-not potential. Petitioners submit that Plaintiffs' counsel accurately portrayed the illusory nature of Petitioners School District's participation on remand in the following colloquy which occurred subsequent to the issuance of the first Court of Appeals Opinion:[11]

> "JUDGE DeMASCIO: The question I'm concerned about: What was the reason or reasons for vacating the metropolitan order?
>
> MR. LUCAS: I think simply because one of the parties who should have been there when the metropolitan remedy was shaped, or a number of parties, weren't there. *It's as if this Court did not grant the defendant the presence at his sentencing, and the Court of Appeals sent it back and said: He's got to be resentenced,* and that's maybe an unfortunate analogy, but I tried to put it within the framework of this Court."[12] [Emphasis added.]

Plaintiffs statements that "upon a proper showing" Petitioners should be permitted to present additional "relevant" evi-

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[11] Dated December 8, 1972. Although vacated by its granting of a rehearing en banc on January 16, 1973, that portion of the opinion relating to the remand to the District Court to join all absent but affected school districts remained unchanged in its June 12, 1973, opinion, from which this appeal is taken.

[12] This colloquy took place in connection with a miscellaneous Motion of the Detroit School Board, heard by District Judges Kaess, Kennedy and DeMascio on December 11, 1972, during the absence of District Judge Roth as a result of illness. (R. 64). Even Plaintiffs' counsel clearly perceived the right of hearing to be afforded Petitioners as meaningless.

dence on all issues is belied by what has occurred below and does not assuage Petitioners' fears in the least.[13]

Assuming *arguendo* that this Court may remand this cause for further proceedings with respect to issues pertaining to the extent and effects of segregatory acts beyond the boundaries of the Detroit school district, it is respectfully submitted that only a vacation of *all* prior orders, and a direction that the District Court *shall* reopen the proceedings on *all* issues, will adequately protect the interests that Petitioners' School Districts represent.

Plaintiffs also assert that the treatment of Peitioners School Districts below is, in any event, immaterial, because the Defendants Milliken, et al. have the power, if so ordered by the District Court, practicably to coerce any local school district to participate in the relief requested by Plaintiffs. Petitioners School Districts submit, however, that this assertion is not only legally and factually incorrect, but entirely misses the point. For example, the District Court does not have the lawful power to order the defendants Milliken, et al. to refuse to certify teachers or withhold State Aid, etc.[14] in violation of the provisions of State law governing the administration of such subjects, so as to coerce compliance with any order issued by the District Court. Petitioners School Districts have a fundamental right to participate in this litigation with respect to *all* issues, *violation and remedy*, to the extent that determination of such issues might have an effect on their interests.

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[13] As but one example, the Conditions on Intervention imposed on Petitioners Schools Districts (A. Ia 206-207) were proposed by Plaintiffs.

[14] The Plaintiffs' reference to M.C.L. §340.252-253 regarding "removal of non-complying local officials from office" is particularly misleading. A member of a board of education may be removed only after proper notice, hearing and finding that he "... persistently and without sufficient cause refuse or neglect to discharge any of the duties of his office..."

Notwithstanding Plaintiffs present argument, the fact that they originally joined the Detroit school district as a party defendant belies their assertion now that school districts to be affected by any desegregation plan need not be joined as defendants. See also *Bradley* v. *School Board of the City of Richmond, Virginia*, 51 F.R.D. 139, 142 (E.D. Va., 1970) "To be sure, state officials may only be directed, in fulfillment of this duty, to use those powers granted to them by state law. For this reason the relief which may be demanded of state as opposed to local, officials is restricted..."

Plaintiffs assert that Petitioners School Districts do not obtain such a right to be heard on *all* issues under the provisions of Fed. R. Civ. P. 19. They reason that under Rule 19(b), even without joinder of Petitioners School Districts, the District Court can afford them complete relief and Petitioners School Districts have no interest cognizable under Rule 19 because they have no *legal* interest to be affected. This case, however, calls for the application of Rule 19(a)(2)(i) and *not* Rule 19(b), which is totally inapplicable because joinder of Petitioners School Districts has always been 'feasible.'[15]

For joinder under Rule 19(a) at the District Court level, there must exist a possibility or potential that the party not joined will, *as a practical matter*, have his ability to protect his interest in the subject of the action impaired or impeded.[16] This Court has also interpreted the applicability of Rule 19 at the Appellate level and held that a Court of Appeals on its own initiative should take steps to protect the absent party. *Provident Bank* v. *Patterson*, 390 U.S. 102 (1968).

Instead of taking steps to protect Petitioners School Districts' interests by instructing the District Court to receive additional evidence on *all* issues, after noting that under Michigan law Petitioners School Districts have the right to sue and be sued and are necessary parties under Rule 19,[17] the Court of Appeals ordained a "metropolitan" remedy. Although the precise details of

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[15] *Provident Bank* v. *Patterson*, 390 U.S. 102, 109 (1968).

"Rule 19(b) suggests four 'interests' . . . to determine whether in equity and good conscience, the Court should proceed without a party *whose absence from the litigation is compelled.*" [Emphasis added.]

[16] Ibid at 110, 111; See also, *Bradley* v. *School Board of the City of Richmond, Virginia*, 51 F.R.D. 139, 141 (E.D. Va., 1970), where the District Court concluded that "to wait until all the evidence is adduced to determine the need for joinder of additional parties would create a risk of unjustifiable delay in the resolution of a controversy and a waste of the efforts of all involved. [Citations omitted.] It would appear, therefore, that absent parties should be joined if it is probable that the relief sought cannot be achieved, or can be achieved only partially or conditionally without them. . . ."

[17] It should be noted that in *Hoots* v. *Commonwealth of Pennsylvania*, 359 F. Supp. 807 (W.D. Pa. 1973) and *Husbands* v. *Commonwealth of Pennsylvania*, 359 F. Supp. 925 (E.D. Pa. 1973), cited by Plaintiffs, the State of Pennsylvania was a named party defendant. In this case the State of Michigan is *not* a party.

the "metropolitan" desegregation plan have not been ordered, there is no reason to believe that the basic parameters of the remedy will be any different than initially decreed by the District Court.[18]

Plaintiffs also assert that although Rule 19 and equitable concepts of fairness may apply to Petitioners School Districts, the Fifth Amendment to the United States Constitution does not, because school districts have no proprietary interests and therefore could not be deprived of property. The Michigan authority cited in this assertion is not supportive of said assertion.[19] The simple answer is contained in the Michigan School Code itself, which reads, in part:

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[18] Furthermore such relief contemplates more than merely having the defendants Milliken, et al. exercise existing power under State law. This is indicated by the following passage from the District Court's June 14, 1972 Order (Pet. A. 104a-105a) pertaining to recommendations of the State Superintendent Of Public Instruction On School Governance in the desegregation area: "... The Superintendent, consistent with the rulings and orders of this Court, may be guided, *but not limited, by existing state law;* where state law provides a convenient and adequate framework for interim or ultimate relief, it should be followed, *where state law either is silent or conflicts with what is necessary to achieve the objectives of this order,* the Superintendent shall independently recommend what he deems necessary. . . ." [Emphasis added.]

[19] Bradley Brief, p. 77, n. 62 & 64:

(a) Michigan Atty. Gen. Opinion No. 406 turned on the question of whether School District Property was "State property" for purposes of making loans from the Veterans Trust Fund in violation of Art. X, Sec. 12 of the 1908 Mich. Const., which stated: "The credit of the state shall not be granted to, nor in aid of any person, association or corporation, public or private." See also *Detroit Museum of Art* v. *Engel*, 187 Mich 432 (1915), holding that a city has the same status as the "state" for the purposes of that state constitutional provision.

(b) Michigan Atty. Gen. Opinion No. 4371 deals only with a question of statutory construction and legislative intent, viz: Are Boards of Education "State Officers" for purposes of statutory provisions governing public construction contracts.

(c) *Attorney General* v. *Lowrey*, 131 Mich. 639; 92 N.W. 289 (1902), *aff'd.* 199 U.S. 233 (1905), holds that the *state legislature* has *absolute* authority over school districts and municipalities, and therefore the legislature has the power to incorporate several primary school districts into one union and graded school district, with the property of the former becoming the property of the latter.

"Every school district shall be a body corporate under the name provided in this act, and may sue and be sued in its name, *may acquire and take property*, both real and personal, for educational purposes within or without its corporate limits, by purchase, gift, grant, devise or bequest, and hold and use the same for such purposes, and may sell and convey the same as the interests of such district may require. . ." M.C.L. §340.352. [Emphasis added.]

Plaintiffs also make the assertion that school districts are not protected by the Due Process Clause because it ". . . reads as if to protect natural persons or wholly private interests. . ."[20] only. Analysis reveals, however, that local units of government are "persons under the Fifth Amendment".[21] The *Sinking-Fund Cases*, 99 U.S. 700 (1878), first recognized that quasi-public corporations are protected by the Due Process Clause. The Court held that a railroad corporation could not be deprived of property without due process of law, even though "[t]his corporation is a creature of the United States. It is a private corporation created for public purposes . . ." *Sinking-Fund Cases, supra*, at 719. This principle was again recognized in *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), wherein the Court held that the private schools in question had a proprietary interest in present and prospective patrons of their schools which was protected by the Fourteenth Amendment.

The Due Process Clause of the Fourteenth Amendment was specifically held applicable to the local unit of government in

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[20] Bradley Brief at p. 76.

[21] Plaintiffs and Respondents Detroit Board, et al., cite *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323 (1966) as authority for their proposition. That holding, in pertinent part, however, was limited to the question of whether the word "person" could ". . . be expanded to encompass the States of the Union. . . ." As discussed below, however, the distinction between a State of the Union and a State created public corporation having independent status to sue and be sued is determinative. In addition, Petitioners submit that there is a distinction between substantive due process, which was the subject of *Katzenbach*, and procedural due process, which is the subject herein.

Township of River Vale v. *Town of Orangetown*,[22] 403 F.2d 684, 685 (CA 2, 1968), wherein the Court stated:

> "We hold that a municipal corporation like any other corporation is a 'person' within the meaning of the fourteenth amendment and is entitled to its protection."[23]

The Michigan Supreme Court has declared that "[a] school district is a municipal corporation." *Hall* v. *Ira Township*, 348 Mich. 402, 405; 83 N.W.2d 443, 445 (1957).

The distinction between a State and one of its local units of government was recently discussed by this Court in *Moor* v. *County of Alameda*, 411 U.S. 693 (1973), wherein Mr. Justice Marshall analyzed the "persuasive indicia of the independent status" of counties in California, to determine that such counties were not simply "the arm or alter ego of the State" and therefore are citizens of the State for diversity purposes. Included as such "persuasive indicia" are the facts that the governmental unit has corporate powers, is a body corporate and politic, may sue and be sued, is authorized to levy taxes, may sell, hold and otherwise deal in property, and may issue bonds payable from local taxes. [24] Under Michigan law, a school district possesses every one of such indicia, and, under the authority of *Moor*, may not be deemed a

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[22] It should be specifically noted that this case followed this Court's decision in *Katzenbach*, *supra*. See also, *Township of Middletown* v. *Institution District*, 6 Pa. Cmwlth. 146; 293 A.2d 885 (1972) and *Nelson* v. *Garland*, 123 Pa. Super. 257; 187 A. 316 (1936).

[23] Petitioners can determine no discernible distinction between the meaning of the word "person" as used in the Fifth and the Fourteenth Amendments insofar as their applicability to "municipal corporations". See also *Akron Board of Education* v. *State Board of Education of Ohio*, ___ F. 2d ___ (CA 6, 1974); 42 L.W. 2395, which held that a local board of education has standing to sue the state board of education and that while a local school district may not be a "person" for purposes of the Civil Rights Act, its superintendent and members of its board of education are "persons" for that purpose.

[24] With respect to the status of local school districts, compare *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 51-52, n. 100, (1973) with Michigan law. See Brief of Grosse Pointe Schools at p. 48, n. 91; Brief of Allen Park at pp. 47-48; and Brief of Amici Bloomfield Hills School District, et al, at pp. 6-7.

mere arm or alter ego of the State. It is therefore submitted that Petitioners School Districts are entitled to protection under the Due Process Clause of the Fifth Amendment to the United States Constitution.

The parents and school children residing in school districts which are petitioners herein are represented by no party other than said Petitioners School Districts.[25] The Petitioners School Districts stand in the position of parens patriae[26] for such parents and children, with respect to the claims made by Plaintiffs. In this capacity, the Petitioners School Districts also represent the interests of such parents and children, who are unquestionably "persons" under the Fifth Amendment, and should accordingly be afforded fundamental rights of procedural due process[27] in their representation of such interests.

Plaintiffs ask this Court to declare that local school districts have *no right* in the District Courts of the United States, to appear and meaningfully defend an action which challenges the exercise of their State Constitutional and statutory responsibility to educate the children resident therein, and effectively strikes at their very existence. It is respectfully submitted that this oppressive suggestion should be rejected.

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[25] The District Court has made no certification of a class of suburban parents or children, notwithstanding the asserted organizational purpose of Tri-County Citizens, etc. Brief of Respondents Kerry Green, et al., p. 2.

[26] This case is again to be distinguished from *Katzenbach, supra,* where this Court held a State does not have standing as the parent of its citizens, with respect to a claim of *substantive* due process against the Federal Government, which is the ultimate parens patriae of every American citizen. See also *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972) and *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

[27] See *Akron Board of Education* v. *State Board of Education of Ohio*, ___ F. 2d ___ (CA 6, 1974); 42 L.W. 2395, wherein the Court of Appeals held that because of the close relationship between the school district and the parents of school children residing therein, the school district had standing to sue the State Board of Education on behalf of such parents as a class. It cannot be denied that Petitioners School Districts also represent the legal interests of parents and children residing within said school districts. *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin* v. *Yoder, supra.*

CONCLUSION

Neither the lower courts nor Plaintiffs in this Court have provided any rational basis for concluding that the alleged segregatory conduct of defendants Milliken, et al. is causally related to the racial composition of the school districts within the tri-county area. Plaintiffs' eleventh hour confinement theory is without substance.

This cause "... reveals the familiar phenomenon that in metropolitan areas minority groups are often found concentrated in one part ..." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 25 (1971). As stated by the trial court, "[t]he principal causes undeniably have been population movement and housing patterns..." (Pet. A. 33a). There has been no showing here "... that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools..." as between Detroit and the other eighty-five (85) school districts in the tri-county area. *Swann, supra*, at page 32.

It must be stressed that the scope of the remedy is limited by the nature of the constitutional violation, *Swann, supra*, at 16. The violation here must be limited to the finding of *de jure* segregation within Detroit by its school board, from which it has elected not to appeal. Further, with respect to relief within Detroit, we would only quote Plaintiffs' chief trial counsel:

> "... any concept that a school must be majority white... is a racist concept..." (R. 4688).

Racial disparity among school districts does not violate the Equal Protection Clause in the absence of a showing that school district boundary lines have been manipulated for segregatory purposes. *Wright* v. *Council of City of Emporia*, 407 U.S. 451, 470 (1972); *Swann, supra*, at 32; *Spencer* v. *Kugler*, 326 F. Supp. 1235 (N.J. 1971), *aff'd.* 404 U.S. 1027 (1972); *Bradley* v. *School Board of the City of Richmond*, 462 F.2d 1058 (CA 4, 1972), *aff'd.* by equally divided Court 412 U.S. 92 (1973). Here, the trial court took *no* proofs and made *no* findings on the establishment of school district boundaries, thus negating any multi-district remedy (Pet. A. 59a-60a).

The forced reassignment of upwards of 300,000 school children among diverse and distant school districts, as commanded by the District Court, can only be premised on the thesis that without regard to the existence or nature of constitutional violations desegregation requires minority black school systems. It is submitted that neither *Brown* nor its progeny permit the remedy decreed in this case.

The constitutional mandate is to make public education available to all on equal terms, without regard to race or color. *Brown I*, 347 U.S. 483 (1954). The mission of desegregation is the achievement of a unitary school system wherein school authorities exclude no pupil from any school on account of race or color. *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969). The mission of desegregation is not racial balancing. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 23 (1971).

Here the constitutional violations found are limited to the operation of the Detroit school district so as to exclude children from certain schools within that school district on account of race or color. The Constitution requires and permits only the conversion of the Detroit school district to a unitary school system.

Plaintiffs claim, that denial of a multi-school district remedy shortens the intended reach of *Brown* and resurrects *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), erroneously suggests that this Court's holding in *Brown* is constructed of some sort of judicial elastic with infinite stretching qualities. As Mr. Justice Frankfurter cautioned in *Gomillion* v. *Lightfoot*, 364 U.S. 339, 343-344 (1960):

> "Particularly in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gives rise to them, must not be applied out of context in disregard of variant controlling facts."

On this record, the case against defendants Milliken, et al., must fall. And in light of Plaintiffs' amended complaint, which does not allege any *de jure* segregatory control as to either the establishment of the boundaries or the operation of the other

eighty-five (85) school districts in the tri-county area, there is no basis for remand. (A. Ia294-295; Bradley Brief, p. 20, n. 15) Petitioners respectfully submit that this Court should dismiss defendants Milliken, et al. and Petitioners Schools Districts, and reverse the decision of the Court of Appeals for the Sixth Circuit to the extent said decision requires the imposition of a multi-school district remedy to desegregate the Detroit public school system.

Respectfully submitted,

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